

Old Georgetown Village
Homeowners Association
c/o Jeffrey Van Grack, Esq.
3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814

VS.

Case No. 584-G

William H. Bevan
11229 Empire Lane
North Bethesda, MD 20852

DECISION AND ORDER

The above entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on March 12, 2003 pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. The duly appointed hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

This is a complaint filed by a homeowners association against one of its residents on July 9, 2002. The Association seeks the removal of a radio antenna and supporting mast approximately 18 to 20 feet high which it contends violate provisions of its Declaration of Covenants. The Association further contends that this antenna and supporting mast are not protected under the Telecommunications Act of 1996, 47 USC Sections 151 et seq., and regulations adopted pursuant

thereto. The Respondent property owner contends that the Association has no authority in this matter because he possesses a United States of America Federal Communications Commission Amateur Radio License. At the March 12, 2003 hearing, the Respondent added for the first time the defense that he at times has used the antenna to receive local television broadcast signals.

FINDINGS OF FACT

1. The Complainant Old Georgetown Village Homeowners Association is a homeowners association located in Montgomery County, Maryland.
2. Respondent is the owner of 11229 Empire Lane, North Bethesda, Maryland 20852, a property located within the boundaries of the Association. As the owner of that property Respondent is subject to the Declaration of Covenants, Conditions and Restrictions for Old Georgetown Village.
3. The Declaration of Covenants, Conditions and Restrictions for Old Georgetown Village recorded among the Land Records of Montgomery County, Maryland provides in Article VI, Section 8:

“Section 8. No exterior radio or television receiving or transmitting antennae or external apparatus shall be installed on any Lot. Normal radio and television installation only within a building are excepted.” (R-13)
4. Respondent has erected a radio antenna and supporting mast on the chimney on the roof of his property which is approximately 18 to 20 feet in height.
5. The Association has requested that Respondent remove this antenna and supporting mast. Respondent contends that because he has a United States of America Federal Communications Commission Amateur Radio License (R-29) the Association has no authority to require him to remove the radio antenna and supporting mast.

6. On March 11, 2003 Respondent sent a letter by facsimile to the Housing and Community Affairs Division of Consumer Affairs requesting that the March 12, 2003 hearing be continued. He did not contact counsel for Complainant directly, but the Commission was able to reach counsel for Complainant on the evening of March 11, 2003. Complainant objected to the continuance.

7. The basis for the request for continuance was that Respondent was scheduled to appear in the Circuit Court for Montgomery County, Maryland on March 13, 2003 and he needed to prepare to testify.

8. The panel noted that the notice for the March 12, 2003 hearing was mailed to the parties, including the Respondent on November 8, 2002. The March 13, 2003 hearing in the Circuit Court for Montgomery County, Maryland, according to Respondent's Exhibit No. 1, was set by the court on December 23, 2002. Further, if the March 12, 2003 hearing were to be continued, the next available date would not be until July or August of 2003. The Respondent had requested that the hearing in this matter be set after January 1, 2003 so as to not interfere with his night school commitments and the Commission agreed by setting the case for March 12, 2003. For those reasons, the panel unanimously denied the request for continuance. As it turned out the hearing commenced at 6:30 p.m. and ended at 8:32 p.m. The Respondent left the hearing at 8:15 p.m. during the testimony of the president of Old Georgetown Village Homeowners Association, John DePalma the Association's last witness. The Respondent stated that he could wait no longer and had to prepare for his hearing on March 13, 2003. The panel chair suggested to the Respondent that the hearing would probably not last more than another 15 minutes, and asked him to remain, but the Respondent

left anyway.

9. The testimony at the hearing was that the Respondent has represented to the Board of Directors of the Association that he works for the Federal Bureau of Investigation and that he uses the radio antenna in connection with his work. The Respondent has further said that he would be able to use this antenna for radio communication when all other devices might be down as the result of a terrorist or similar attack.

10. The Respondent testified at the hearing that at times he has used the subject antenna to receive local television broadcast signals. The contents of the record, Commission's Exhibits 1 and 2 contain no statement by the Respondent or anyone else prior to the hearing on March 12, 2003 that the antenna is used to receive local television broadcast signals. When the Respondent defended his right to have the antenna he advised the Association by letter dated February 10, 2002:

“Attached is a copy of my radio license issued by the United States of America Federal Communications Commission. Old Georgetown Village has no authority in this matter. Should you or any member of the Board of Old Georgetown Village Townhouse, employee of Old Georgetown Village Townhouse or contractors step on my property without my written permission they will be **ARRESTED** and charged with **CRIMINAL TRESPASS!!!!**” (Emphasis in original, R-28.)

The Respondent submitted with this letter a copy of a United States of America Federal Communications Commission Amateur Radio License, W3FLY, with effective dates of October 6, 1998 to October 6, 2008. (R-29)

11. Members of the panel questioned the Respondent regarding the uses of the antenna, specifically as to what devices the antenna is primarily connected. The Respondent refused to answer these questions, stating instead that Federal law did not require him to answer or allow the Commission or the Complainant Association to interfere with his installation of the antenna and

mast.

12. Witnesses from the Association testified that until the night of the hearing March 12, 2003, the Respondent had never contended that the antenna is used to receive local television broadcast signals.

13. The testimony of record was that the Respondent has a satellite dish for the purpose of receiving direct broadcast satellite service. Additionally, cable T.V. connection is available in the community, although the Respondent is not currently connected to cable.

14. None of the correspondence sent by the Association to the Respondent contained a notice of dispute required under Section 10B-9(d) of the Montgomery County Code.

CONCLUSIONS OF LAW

1. As part of these proceedings, and particularly in the course of the hearing on March 12, 2003, the panel had the opportunity to assess the credibility of the parties and witnesses by observing their demeanor, their responses to questions or in the case of the Respondent, the refusal to respond to questions, and the consistency of their testimony and positions at the hearing when compared both to the evidence in the written record and to their positions taken prior to the hearing. From the evidence of record the panel concludes that while the antenna in question may at some time have been used or be used in the future to receive local television broadcast signals, that such use was and is incidental and de minimus. The panel further concludes that such incidental, de minimus use of the antenna to receive local television broadcast signals is not protected under the Telecommunications Act of 1996 and the regulations adopted thereunder, in particular as they appear in 47 Code of Federal Regulations, Sections 1.4000 et seq. Respondent's late assertion of such use is not credible. The panel was able to observe directly and to evaluate Respondent's

testimony, compared to earlier written communications with the Association. The panel concludes that the Respondent's equivocation in his testimony, and refusal to respond to questions legitimately designed to determine the scope of use of the antenna undermined his credibility on the issue of use of the antenna.

2. The Association presented a Memorandum Opinion and Order of the Federal Communications Commission entitled Memorandum Opinion and Order adopted December 18, 2001.(R-40) The Memorandum Opinion and Order involved a request that the Federal Communications Commission expand its limited preemption policy for antenna and antenna support structures used in the amateur radio service to include a preemption of covenants, conditions and restrictions contained in deeds and bylaws of homeowners associations or regulations of an architectural control committee. The Federal Communications Commission declined to expand the scope of its limited preemption policy to include a preemption for amateur radio stations which would extend to preempt the applicability of covenants in a homeowners association such as the Complainant to the antenna in question.

3. The type of antenna and supporting mast installed by Respondent are not protected under the Telecommunications Act of 1996, 47 USC Sections 151 et seq. or the regulations adopted thereunder.

4. Since the Respondent's radio antenna and supporting mast enjoy no protection under applicable Federal Law, the covenants of the Association apply and those covenants prohibit the antenna and supporting mast.

5. The Association is authorized pursuant to Article VII, Section1 of its Declaration of Covenants, Conditions and Restrictions to exercise self-help to remove violations of its

covenants by following the procedures of that section.

6. The panel does not view the erection of the antenna and supporting mast as a matter which falls under the requirements for prior approval under Article V of the Declaration of Covenants, because there is an absolute prohibition of such antenna and the supporting masts associated with their installation.

7. Under the facts of this case, the panel is unable to find a legal basis for awarding attorney's fees to the Complainant association under Section 10B-13(d) of the Montgomery County Code. The actions of the Respondent do not fall squarely under any of the provisions of Section 10B-13(d) paragraphs 1, 2, or 3.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 20th day of May, 2003

ORDERED:

1. Respondent shall remove the subject antenna and supporting mast and all related hardware and supporting installations from his property within 30 days from the date of this order.

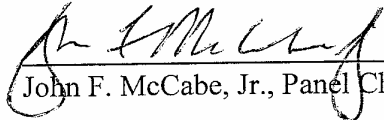
2. If Respondent fails to remove the subject antenna and supporting mast, etc., as described above then the Association, following the procedures of Article VII of its Covenants, may remove the same and assess the Respondent with costs as provided therein. The Association however is not required to exercise the remedy of self-help and may do so in its sole discretion.

3. In addition to any other penalty or enforcement action permitted by law Respondent's failure to comply with this order shall constitute a Class A civil violation within the meaning of Section 10B-13(j) of the Montgomery County Code.

4. The Complainant is ordered to include the notice required under Section 10B-9(d) of the Montgomery County Code in communications regarding disputes under Chapter 10B of the Montgomery County Code.

The panel suggests that the Complainant append to its Declaration of Covenants a statement that Article VI, Section 8 is modified to the extent provided by the Telecommunications Act of 1996. The provisions of Article X, Section 2. Severability will operate to leave the remaining unaffected provision of Article VI, Section 8, in full force and effect.

The decision of the panel is unanimous. Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days after the date of entry of this Order in accordance with the Maryland Rules of Procedure.


John F. McCabe, Jr., Panel Chair